SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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NO. 74-621

* * *

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL.,

Petitioners

V.

THE TEXAS HIGHWAY DEPARTMENT, ET AL., AND THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents

* * *

BRIEF FOR THE RESPONDENT TEXAS HIGHWAY DEPARTMENT, ET AL., IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

* * *

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December 1974

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v.

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The Texas Highway Department and other state defendants file this their reply to the Application for Writ of Certiorari.[1]

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[1]The San Antonio Conservation Society, which voted to withdraw as a Plaintiff in this cause in 1970, and formally withdrew, should not be considered a party to the Petition.

JURISDICTION

Generally this Court has jurisdiction under 28 U.S.C., Section 1254(1). However, as we shall demonstrate hereafter, Petitioners have not brought this case within the criteria of Rule 19(b) of this Court's rules for consideration of an application for a writ of certiorari.

STATUTE INVOLVED

The Federal-Aid Highway Act of 1973, a comprehensive act of some 65 sections, in one section, Section 154, (87 Stat. 276-277) provided:

TERMINATION OF FEDERAL-AID RELATIONSHIP

> Sec. 154. (a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.
>
> (b) The amount of all Federal-aid highway funds paid on account of sections of the San Antonio North Expressway in Bexar County, Texas

(Federal-aid projects numbered U 244(7), U 244(10), UG 244(9), U 244 (8), and U 244 (11), shall be repaid to the Treasurer of the United States and the amount so repaid shall be deposited to the credit of the appropriation for "Federal-Aid Highways (Trust Fund)". At the time of such repayment the Federal-aid projects with respect to which funds have been repaid and any other Federal-aid projects located on such expressway and programed for expenditure on such project, if any, shall be canceled and withdrawn from the Federal-aid highway program. Any amount so repaid, together with the unpaid balance of any amount programed for expenditure on any such project shall be credited to the unprogramed balance of Federal-aid highway funds of the same class last apportioned to the States, respectively. The amount so credited shall be available for expenditure in accordance with the provisions of title 23, United States Code, as amended.

QUESTION PRESENTED

Whether Congress denies persons equal protection of the laws when it determines that a certain highway which is to be built without federal funds is to be a nonfederal-aid highway?

STATEMENT OF THE CASE

Given the rules relative to review of summary judgments, petitioners'[2] statement of the nature of the case is adequate except in the following particulars. While the Secretary of Transportation did at one time conditionally authorize construction of the two end segments of the North Expressway, the agreement between the Secretary and the Texas Highway Commission was, as stated by petitioners on a prior appeal to this Court (Brief for the Respondents in Opposition, No. 71-1198, October Term 1971, p. 5n) that, "once the Secretary reached a decision on the middle segment the state would have to concur or not only be ineligible for federal aid for the middle segment but also refund the amounts for the end segments." There was never any intent by the federal or state agency to subvert federal environmental law. The state had an obligation to the people of San Antonio to build the road on the route chosen by them and both agencies recognized and attempted to accommodate this obligation. Contrary to the assertion of petitioners (Application, p. 8), Texas sought no legislative relief in Congress. The people of San Antonio successfully petitioned their Congress for relief

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[2] Respondents do not agree the facts are as recited by petitioners, but for present purposes, our differences are immaterial.

from an intolerable grievance.[3]

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[3]The San Antonio civil and governmental organizations supporting the legislation to permit completion of the North Expressway are legion; the support of common folk is exemplified by the following:

FINDLING, MILAM & PYLE,
CERTIFIED PUBLIC ACCOUNTANTS,
San Antonio, Tex., April 18, 1972.

CITIZENS COMMITTEE FOR COMPLETION OF THE NORTH EXPRESSWAY,
San Antonio, Tex.

GENTLEMEN: We hereby certify that we have counted 103,337 signatures on your petition:

"We, the undersigned residents of San Antonio and Bexar County, strongly urge the immediate resumption of construction and prompt completion of the North Expressway Project. The people have been too long denied the use of this expressway and feel that the delay has been detrimental to the general welfare of all."

This petition was circulated between September 29, 1971, and December 15, 1971, and our firm was selected by your committee to count the signatures.

Yours very truly,

WILLARD H. FINDLING, *Partner.*

JAMES W. KNIGHT,
County Clerk & Ex-Officio Clerk of the Commissioners' Court of Bexar County, Tex.
By ROSE LYNN RIZZO, *Deputy.*

SAN ANTONIO BUILDING AND CONSTRUCTION TRADES COUNCIL RESOLUTION

Whereas, the voters of San Antonio approved the North Expressway over ten years ago, but legal entanglements and red tape have frustrated the will of the people, delayed the completion of the Expressway, and caused massive waste of our tax money, and great hardship to the motorists, citizens and businesses of greater San Antonio:

And whereas, the partially constructed North Expressway has already cost millions of our City and State tax dollars and the overwhelming majority of our citizens demand the prompt completion of this vital freeway: Now, therefore, it is

Resolved by the members of the San Antonio Building and Construction Trades Council (AFL-CIO), That our City and State officials are strongly urged to take every lawful means to complete our North Expressway, with or without the use of Federal funds, as soon as possible.

Resolved this nineteenth day of October, nineteen hundred and seventy-one.

JAMES A. MARTIN, *President.*
W. F. KELLER, *Secretary-Treasurer.*

Hearings on S. 502 Before the Subcomm. on Transportation of the Senate Comm. on Public Works, 93d Cong., 1st Sess., pp. 464-469 (1973).

The district court did not dismiss petitioners' action (Application, p. 9). The district court concluded there were no genuine issues as to any material facts and disposed of the case by summary judgment (A. 30a).

REASONS FOR DENYING THE WRIT

1. The only issue presented by this case is whether Congress could grant the petition of the people of San Antonio and redress their grievance by excepting the North Expressway from the federal-aid highway system, thereby approving its construction as a wholly state project. There has been no classification of persons and no abuse of congressional power. There are no "special and important" (Rule 19) reasons for grant of the Writ.

The statement of the petitioners that the lower courts refused to review their contention on due process grounds misconceives the holdings of the lower courts. The lower courts did not refuse to review properly the petitioners' equal protection argument, they rejected it. The statement (Application, p. 13) that the district court "took the position that since the rights involved here were statutory, they could be abrogated by statute, no matter how arbitrary the exemption might be" is wholly unfair to the district court. The district court said (A. 29a), "the decision was made through legitimate political processes, just as was the original decision to secure certain environmental rights. The

due process clause was never intended to protect citizens from losing political or legislative battles when no constitutionally secured rights are threatened thereby." The district court's reasoning is thoroughly in accord with the rulings of this Court.

This Court consistently holds "that the equal protection clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." McGowan v. Maryland, 366 U.S. 420, 427 (1961). In Salsburg v. Maryland, 346 U.S. 545 at 551 (1954), this Court quotes and reaffirms its reasoning from an earlier opinion discussing local legislation and the principles of equal protection:

> (T)here is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be denial to any person of the equal protection of the laws . . . . it means that no person or class of persons shall be denied the same

> protection of the laws which is enjoyed by other persons or other classes in the same place and under the same circumstances. Missouri v. Lewis, 101 U.S. 22, 31.

Section 154 made no classification of persons, only highways. It says that a highway in San Antonio, Texas may be built as a nonfederal-aid highway. Even if a nonfederal-aid highway were unique, the effect on citizens in San Antonio would be uniform and thus present no equal protection question. But nonfederal-aid highways are common, and petitioners' argument ignores that there are already two great classes of highways in this nation, federal and nonfederal. Thousands of miles of highways in the United States are built as state projects and Congress has never attempted to impose on them the protection of federal environmental statutes. The North Expressway stands in the same posture as any other nonfederal-aid highway.

Congress chose not to use a general regulatory scheme when it enacted the environmental statutes at issue in this proceeding; it chose for them to apply only to federal agencies and undertakings.[4] In its dealings with the states, Congress

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[4]The federal agency has said:

> It is the Federal Appellees position that the State of Texas would not be prohibited, as a matter of law, from constructing the North Expressway in San Antonio, Texas, with its own

may choose whether to use its contract powers or its regulatory powers, and its choice presents no equal protection problem. It is only by virtue of contractual financial nexus that the federal environmental statutes are applicable to highway projects constructed by the several states. In the Overton Park case this Court repeatedly recognized that the environmental statutes are conditions on the use of federal funds.

> These statutes prohibit the Secretary of Transportation from authorizing the use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" alternative route exists.
>
> * * * (T)he enactment of 4(f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of Section 4(f) had been met. * * *

Ftn. 4 cont.

> funds if the project is not to be financed with federal funds.

Memorandum in Support of State Appellees' Petition for Rehearing En Banc at 2, Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 446 F.2d 1013 (5th Cir. 1971.)

> Section 4(f) of the Department of Transportation Act and Section 138 of the Federal-Aid Highway Act are clear and specific directives. * * * This language is a plain and explicit bar to use of federal funds for construction of highways through parks - only the most unusual situations are exempted.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 405, 407, 411 (1971) (emphasis added). The converse was pointed out by Justice Douglas in his dissent from the denial of petitioners' application for certiorari at any earlier stage in this case:

> No federal question would, of course, be presented if Texas or San Antonio decided to turn these parklands into a biological desert. But when Congress helps finance a project like this freeway, it becomes a federal project.

San Antonio Conservation Society v. Texas Highway Department, 400 U.S. 968, 978 (1970).[5]

As matters presently stand Congress is not

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[5] Texas does not agree that this freeway would produce a "biological desert." Indeed, it does not agree the lands involved are parklands. Its legal position is, however, that it is free to build the highway with its own funds even if the land is parkland.

helping to finance this project. No federal funds will be used in its construction. Federal funds that had been advanced at an earlier stage have been repaid by the state to the federal government in accordance with specific congressional authorization and Congress has declared that "the expressway shall cease to be a Federal-aid project." Federal-Aid Highway Act of 1973, Sec. 154(a), 87 Stat. 276. The people of San Antonio have been treated no differently from other people in Texas and in other states of the union who have nonfederal-aid highways built in their locales.

At page eight of the Application, petitioners suggest ways in which general legislation might have been enacted to permit the results achieved by Section 154. At page fourteen of the Application, petitioners concede that the very factors which they recognize as having moved Congress to enact Section 154 might have supported general legislation to exempt highways from environmental statutes. But they contend that these factors may not support special or local legislation. They argue that items of local legislation present a severe potential for abuse and that this Court should make a far reaching extension of established concepts of equal protection and impose on the Congress a requirement that it enact laws of uniform application throughout the United States. Petitioners do not limit themselves to the area of environmental law. They say the evil implications of local legislation "extend to all federal programs" (Application, p. 11). But, "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." Tigner v. Texas, 310

U.S. 141, 147 (1940). This Court holds, "the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical Company, 348 U.S. 483, 488 (1955). Further,

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U.S. 141. Or the reform may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there neglecting the others. A.F. of L. v. American Sash Co., 335 U.S. 538. The prohibition of the equal protection clause goes no further than the invidious discrimination.

348 U.S. at 489 (1955).

There is no sound reason why Congress should not tailor its legislation to suit particular locales and particular needs. Congress has done

this throughout the life of the Republic. In the Voting Rights Act of 1965 Congress even chose to treat the states themselves differently. In upholding that legislation, this Court said,

> In acceptable legislative fashion, Congress chose to limit its attention to the geographic areas where immediate action seemed necessary. See, McGowan v. Maryland, 366 U.S. 420, 427 Salsburg v. Maryland, 346 U.S. 545, 550 - 554.

South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

Congress has made exceptions to the environmental laws in only three instances, "the Alaskan oil pipeline, EPA's water quality program, and the San Antonio Freeway." Comment, Frederick R. Anderson, Federal Environmental Law, 4 E.L.R. at 1005. This is hardly indicative of widespread use of the congressional power to enact local legislation, much less petitioners' feared "widespread abuse on the federal level" (Application, p. 11).

2. There are two readily apparent reasons why the Writ should not be granted because of alleged conflict with the opinion of Judge Wright in D.C. Federation v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). First, as conceded by petitioners (Application, p. 16n), Judge Wright's opinion on this point does not speak for a majority of the panel. It is not an opinion of a Court of Appeals. Second, there is no conflict.

Judge Wright was concerned that the people of the District of Columbia, without a political voice in the halls of Congress, were being treated differently from citizens having a voice in Congress. He said, 434 F.2d at 442,

> Since this case involved the right of citizens to participate in the political process as it relates to federal highway projects, we subject this statute to the same scrutiny we would apply to any legislative effort to preclude some, but not all citizens' participation in decision making. (emphasis added)

In Judge Wright's mind, the apparent question was: Did the statute being considered deprive citizens of the District of Columbia of equal protection of the laws without due process, where they had no voice in the political process that enacted the statute, and where they were treated differently from citizens outside the District who had a political voice in the legislative process? This question is not in the present case. Our opponents of the Expressway participated fully in the political process and they lost. Due process may ensure participation; it does not ensure success.

The D. C. Federation case is not in point here for another reason. It involves a federal highway. The present case involves a state highway. The North Expressway has been a state highway ever since Section 154 of the Federal-Aid Highway Act of 1973 was enacted. Congress has not attempt-

ed to treat federal highways differently; it has merely authorized termination of federal highway status. Congress has authority to say what is and is not a federal highway, just as it has authority to say what is and what is not an obstruction to navigation. See please, State of Pennsylvania v. The Wheeling and Belmont Bridge Company, et al. 59 U.S. (18 How.) 421 (1855). Congress has placed the North Expressway in the same posture as any other state highway. The proponents and opponents of the road have the same rights. The Fifth Circuit has recognized the solemn expression of congressional will and has held that the expressway is now a state highway; therefore that federal environmental laws do not apply. It is no answer to characterize this holding as a "circularity" and say that "The North Expressway is a state project only if Section 154 is constitutionally valid" (Application, p. 13n). The presumption is that the action of Congress is valid, and the heavy burden falls on petitioners to show some reason that it is invalid. The North Expressway is a state project unless petitioners can shoulder that heavy burden. They have not done so. Congress has made a choice easily within its appropriate and commonly used sphere of authority.

CONCLUSION

For theforegoing reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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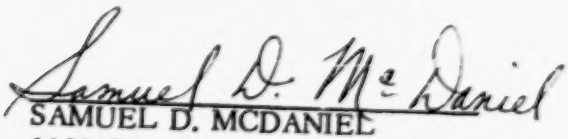

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CERTIFICATE OF SERVICE

This is to certify that on the 16th day of December, 1974, three (3) copies of the foregoing Brief for the Respondent Texas Highway Department, et al., in Opposition to Application for Writ of Certiorari were mailed, postage prepaid, to Hon. John W. Vardaman, Jr., Williams, Connolly & Califano, 1100 Hill Building, Washington, D.C., 20006, counsel for Petitioners; and to The Solicitor General, Department of Justice, Washington, D.C., 20530.

DAVID M. KENDALL